



Richard McPhail
EVP & Chief Financial Officer

March 31, 2022

By Email
Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: *Share Repurchase Disclosure Modernization* (File No. S7-21-21);
Rule 10b5-1 and Insider Trading (File No. S7-20-21)

Dear Ms. Countryman:

The Home Depot, Inc. (“Home Depot,” “our” or “we”) appreciates the opportunity to submit comments to the Securities and Exchange Commission (the “Commission”) regarding the Commission’s proposed rule relating to disclosure of issuer share repurchases¹ (the “Repurchase Rule Proposal”) and the proposed rule relating to Rule 10b5-1 trading plans² (the “10b5-1 Rule Proposal”). Given that these rule proposals address overlapping issues and concerns, we are commenting on both proposals in this comment letter.

At the outset, Home Depot acknowledges the need for transparency about issuer and insider transactions in company stock and the need to prevent abusive practices. However, as drafted, we believe the rule proposals will be unduly and significantly burdensome and costly on issuers and insiders, while sending potentially confusing and unintentional signals to investors and offering only limited benefits. Our specific concerns regarding the rule proposals are discussed below.

Repurchase Rule Proposal

Like many issuers, Home Depot employs share repurchases to return capital to shareholders, as well as to promote efficiency in its use of capital and to manage dilution in the context of new equity issuances under our equity compensation plans. Per our capital allocation principles, as disclosed in our Annual Report on Form 10-K, our first priority is to reinvest in our business. After meeting the needs of the business, we then return excess cash to shareholders

¹ Release No. 34-93783 (Dec. 15, 2021).

² Release No. 33-11013 (Jan. 13, 2022).

through dividends and share repurchases. We always announce our share repurchase authorization in a press release following approval by the Board, and we generally seek to spread repurchases evenly over the year based on forecasted excess cash.

Daily Reporting Imposes a Significant Burden

In requiring daily reporting of share repurchases, the Repurchase Rule Proposal would impose a significant new burden on all issuers that routinely engage in share repurchases. Home Depot typically conducts its share repurchases during open trading windows using a single broker for each trading day.³ During closed trading windows, Home Depot conducts its share repurchases pursuant to Rule 10b5-1 trading plans, which it enters into during an open trading window. In both instances, Home Depot instructs its brokers that all purchases under these plans are to comply with the requirements of Exchange Act Rule 10b-18's safe harbor from market manipulation. Given the amount of cash our business generates and the resulting size of our share repurchase authorization, under normal circumstances, we repurchase shares on a substantial majority of trading days each year.

We believe that conducting repurchases in this manner is the least disruptive to the market and reduces timing-related risks. However, under the Repurchase Rule Proposal, Home Depot and other issuers that similarly seek to mitigate market impact in this manner would be subject to a virtually continuous daily filing obligation, which would impose a significant administrative burden and would not provide any concurrent benefit to investors that could not be similarly achieved through disclosure in either the Company's periodic reports or the proposed Form SR filed on a monthly basis.

While the size and duration of our overall share repurchase program is approved by our Board of Directors, the authorized daily share repurchases are executed by third-party brokers who evaluate market conditions, the requirements of Rule 10b-18 and, when applicable, the requirements of our Rule 10b5-1 plans, and execute trades accordingly. Furthermore, as is required under Rule 10b5-1, once we execute the plan, these brokers execute trades on our behalf without further consultation with or input from us. Daily Form SR reporting – particularly on the basis of executed, rather than settled, trades – would require issuers to create extensive disclosure controls and procedures around the receipt of daily trade reports from their brokers to collect and report the information required by Form SR. This would place a significant burden on all issuers that regularly repurchase shares on a daily basis by requiring the development of internal processes, audit trails and technological interfaces to track this information in real time. In addition, we note that we typically authorize trades based on a dollar amount, not a share amount; therefore, we are dependent on brokers' trade reports to understand the number and price of shares purchased. Brokers would likely need to improve their trade reporting systems to meet the daily deadlines required by the Repurchase Rule Proposal.

³ On occasion, we have also engaged in accelerated share repurchase transactions.

Daily Reporting Would Provide Little Useful Information for Ordinary Investors, While Raising the Likelihood of Improper Use and Confusion

The Commission believes that “[i]nvestors could use this more detailed and timely disclosure to monitor and evaluate issuer share repurchases and their effects on the market for the issuer’s securities.”⁴ We respectfully disagree. Daily information about our ongoing share repurchase program would quickly become “static” or “noise” to investors. Quarterly data presents more meaningful insights into how the share repurchase program is progressing throughout the year, while day to day ebbs and flows reveal little information of value.

In our view, many investors, particularly retail investors and investors who focus on company fundamentals and investing over the long term, lack the interest or incentives to make any sort of productive use of the flood of individually immaterial disclosures that would be filed on the proposed Form SR. Any benefits that might accrue from such daily reporting would be captured not by retail investors but by a small number of sophisticated market participants who have the resources and incentives to process and analyze vast amounts of data on a daily basis. These sophisticated market participants could use Form SR disclosures to reverse-engineer an issuer’s Rule 10b5-1 trading plan parameters and/or the broker’s proprietary trading strategies when effecting open market purchases on behalf of an issuer, in an effort to develop an algorithmic trading program seeking to front-run issuer repurchases. Rather than promoting fair, orderly and efficient markets for all market participants, this would create opportunities for more savvy investors to benefit at the expense of issuers conducting share repurchases and less savvy investors.

Moreover, daily reporting of share repurchases could easily lead to confusion and create unintended, incorrect and unsubstantiated signaling to all investors. For example, in the case of issuers that are typically daily participants in conducting share repurchases, increases or decreases in daily share repurchase amounts or a decision not to repurchase shares on any particular day, would lead investors to infer a number of reasons for any such change – from liquidity concerns to M&A activity, among others – when in fact it could be nothing more than the normal ebb and flow of cash management.

Enhanced Disclosure Under Item 703 or a Monthly Form SR Would Satisfy the Commission’s Objectives

We believe that the Commission’s objectives for the Repurchase Rule Proposal could be accomplished in a manner that is much less burdensome to issuers and less likely to create the confusion or potentially improper activity discussed above. Regarding repurchases such as those conducted by Home Depot, which are material only in the aggregate on a quarterly basis, we believe that more detailed quarterly data on repurchases could be presented in Form 10-Q and Form 10-K, which the Commission could implement by means of relatively straightforward amendments to Item 703 of Regulation S-K to expand the required disclosures on share repurchases. Such enhanced disclosures could present a more meaningful picture of the number of shares repurchased, the timing of repurchases and prices paid for shares over the quarter, such

⁴ Release No. 34-93783 at 13.

as on a bi-weekly basis. Such bi-weekly information could be relevant to and compared against trading activities reported by insiders on Form 4, thereby allowing for the detection of any potential misuse of issuer repurchases. Importantly, we do not believe information about daily purchases should be required to be disclosed, to avoid the unintended effect of potentially allowing sophisticated firms to reverse-engineer Rule 10b5-1 plans. In the alternative, issuers could be required to list the dates on which repurchases have been made, without also having to provide the daily number or price of shares repurchased. If the Commission determines that share repurchase information disclosed on a quarterly basis is not sufficiently timely, we believe issuers could reasonably disclose share repurchase activity through the filing of a Form SR on a monthly basis.

10b5-1 Rule Proposal

The Proposed Cooling-Off Period Should be Eliminated for Issuers

The 10b5-1 Rule Proposal would impose a 30-day cooling-off period for plans entered into by issuers. The stated purpose of such cooling-off period, which was recommended by “investors and other commentators,” is to “reduce the risk that an insider could benefit from any material nonpublic information of which they may have been aware at the time of adopting the trading arrangement.”⁵ We believe that this 30-day cooling-off period is excessive and that the risk it is intended to mitigate is not present when issuers are repurchasing their securities to execute share repurchase authorizations approved by their boards of directors. For example, the Commission has cited to the CII Rulemaking Petition as support for this aspect of the rule proposal.⁶ However, the CII Rulemaking Petition does not reference any concerns related to issuers’ repurchases of securities. Rather, its stated concerns are based on a *Wall Street Journal* article by Susan Pulliam and Rob Barry from November 27, 2012, titled, “Executives’ Good Luck in Trading Own Stock.”⁷

Moreover, such a cooling-off period would effectively prevent issuers from using multiple brokers to effectuate repurchases pursuant to Rule 10b5-1 trading plans. As noted above, Home Depot uses 10b5-1 trading plans to continue its share repurchases during closed trading windows. Home Depot often enters into multiple plans on the same day, with each plan covering a different period of time during the closed window and managed by a different or rotating broker to ensure optimal trading execution. This practice allows these plans to be managed by smaller and diverse brokers that would otherwise be unable to manage a plan over a longer period. If adopted, the 10b5-1 Rule Proposal would discourage such practices.

One tangible benefit to having repurchases begin shortly after entering into a Rule 10b5-1 plan is the ability to better forecast cash availability over the term of the plan, thereby promoting the optimal use of cash. If a company was subject to a 30-day cooling-off period, then there would be a much greater risk of over/under estimation, which could lead to inefficient levels of capital either being retained by the company or returned to the capital markets for reinvestment.

⁵ Release No. 33-11013 at 13.

⁶ *Id.* at 14, n. 31 (citing to the CII Rulemaking Petition).

⁷ CII Rulemaking Petition at 2, available at: <https://www.sec.gov/rules/petitions/2013/petn4-658.pdf>.

For all of these reasons, we recommend that the Commission not impose a mandatory 30-day cooling-off period for issuers in order to give issuers the flexibility to pursue the business advantages and important public policy goals that motivate issuers to implement these practices.

The Definition of “Overlapping Plans” Should be Clarified to Exclude Plans That Cover Different Time Periods

The 10b5-1 Rule Proposal would prohibit “overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities.” We agree with the Commission that the affirmative defense should not apply to overlapping plans due to the concern that corporate insiders may enter into multiple plans which run simultaneously, then selectively cancel plans on the basis of material non-public information (“MNPI”). However, we submit that the Commission should provide additional guidance as to the precise meaning of “overlapping plans.”

Specifically, we request that the Commission clarify that entering into more than one plan at one point in time would not constitute “overlapping,” so long as the plans do not cover the same period of time. As detailed above, it is not unusual for companies to enter into several Rule 10b5-1 trading plans at a single point in time, arranging for each plan to cover different periods of time (e.g., per month, per quarter, per six-month period), with each plan managed by a different broker to ensure optimal trading execution. Given that the effective periods of each trading plan under such an approach are sequential rather than simultaneous, issuers cannot selectively choose which plan to apply at any given point in time while canceling or terminating undesirable plans. A clarification in this regard would avoid ambiguity and assure companies who utilize such an approach that their Rule 10b5-1 trading arrangements are not prohibited under the 10b5-1 Rule Proposal.

The Requirements to Disclose a Company’s Insider Trading Policies and Procedures Should be Revised to Permit Disclosure on the Company’s Websites

The 10b5-1 Rule Proposal would require an issuer to publicly disclose its insider trading policies and procedures, if it has adopted such policies and procedures, in its annual reports on Form 10-K and proxy and information statements on Schedules 14A and 14C. We agree with the Commission that well-designed insider trading policies and procedures can play an important role in deterring and preventing trading on the basis of MNPI. However, we believe that the requirement to disclose such policies and procedures in these SEC filings will yield little meaningful benefit to investors, while at the same time taking up lots of space in such filings. Many companies already disclose their insider trading policies and procedures publicly on their websites, enabling investors to assess a company’s corporate governance practices and evaluate the extent to which those policies and procedures protect shareholders from the misuse of MNPI. We believe that publicly disclosing a company’s insider trading policies and procedures in this manner sufficiently achieves the Commission’s goals. Thus, we believe the requirement to disclose such policies and procedures in a company’s SEC filings should be required only if such policies and procedures are not already publicly disclosed on the company’s website. This

would be consistent with the SEC's disclosure requirements for codes of ethics (Regulation S-K Item 406(c)(2)) and board committee charters (Instruction to Regulation S-K Item 407(b)(2)).

The Requirements to Disclose Option Grants Are Unnecessary, Potentially Misleading and Burdensome

The 10b5-1 Rule Proposal would require an issuer to disclose in tabular format on Form 10-K any option grants made within 14 days of the release of MNPI. The Commission intends for this to allow investors to detect events characterized as “spring-loading” (whereby an issuer times an option grant to occur before the release of positive MNPI) or “bullet-dodging” (whereby an issuer times an option grant to occur after the release of negative MNPI). We believe such disclosure requirements to be unnecessary and potentially misleading. On the first point, an insider's security transactions are already disclosed on Section 16 reports that are filed publicly within two business days of an equity grant, thereby providing the markets with timely disclosure of the securities transactions, the proximity of which can be easily compared to company press releases and periodic reports. This existing disclosure regime already enables the markets and regulators alike to quickly identify any transactions potentially associated with spring-loading and bullet-dodging.

On the second point – potentially misleading – for many issuers, including Home Depot, the timing of equity grants is simply tied to the schedule of meetings of the board of directors' compensation committee. The tabular disclosure required by the 10b5-1 Rule Proposal would suggest that there is somehow a relationship between the timing of the equity grant and the release of MNPI if the dates occur within 14 days of each other when, in fact, the timing of equity grants has been determined based on the board and board committee calendar. Rather than affirmatively suggest that such a relationship exists, we believe the SEC's rules should be neutral in this regard.

In addition, we believe that the requirement to disclose option grants made within 14 days of an issuer share repurchase would result in meaningless disclosure. As a practical matter, as noted above, many large companies, including Home Depot, are in the market repurchasing issuer shares practically every day. Such repurchases, particularly when done pursuant to the Rule 10b-18 safe harbor, are ordinary business transactions, overseen, typically, by the finance or treasury function. The table in proposed Item 402(x) assumes that such issuer repurchase, regardless of amount or whether it complies with Rule 10b-18, constitutes MNPI if it occurs within 14 days of a stock option grant, when, in fact, as a general matter, it does not.

Conclusion

Thank you for the opportunity to share our views on both rule proposals. If you have any questions on the content of this letter, please contact Stacy Ingram, Associate General Counsel and Deputy Corporate Secretary, at 770-384-2858.

Respectfully submitted,

/s/ Richard V. McPhail

Richard V. McPhail
Executive Vice President and Chief
Financial Officer

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner